

EXHIBIT 151

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF BRONX : CIVIL TERM : PART IA-32
3 -----x
4 NEW YORK BOTANICAL GARDEN :
5 Plaintiff, Index No.
6 803872/2021E
7 ALLIED WORLD ASSURANCE CO. (USA), :
8 Defendant :
9 -----x
10 Bronx Supreme Court
11 851 Grand Concourse
12 Bronx, New York 10451
13 July 20, 2021
14 B E F O R E: HONORABLE EDDIE MCSHAN,
15 Supreme Court Justice
16
17 A P P E A R A N C E S: (Via Microsoft Teams)
18
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Xiomara O. Carias-Mier
Senior Court Reporter

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1 (Whereupon, the following occurred via virtual
2 proceedings.)

3 THE COURT: So, we have everybody?

4 THE CLERK: We do.

5 THE COURT: I'm asking counsel, do you want a
6 record?

7 MR. KAZANJIAN: Yes, Your Honor.

8 THE COURT: So we'll have the clerk call the case.

9 THE CLERK: Certainly.

10 This is index 803872 of 2021E, the case of New
11 York Botanical Gardens versus Allied World Assurance.

12 Mr. Kazanjian, you may now note your appearance
13 again.

14 MR. KAZANJIAN: Thank you. My name is John
15 Kazanjian, I represent the New York Botanical Garden, the
16 Plaintiff in this matter.

17 Along with me today, Your Honor, are Justin
18 Jamail, the general counsel of the New York Botanical
19 Garden and Paul Sinegal, the associate general counsel.
20 They are observants today.

21 And also along with me today is my colleague,
22 Jessica Kyle also pending before the Court motion sequence
23 number one, is a motion to admit Ms. Kyle pro hac vice in
24 this matter.

25 That motion was not opposed. I'm pleased to

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1 address it to the extent the Court wishes today but just
2 wanted you to know that the matter was pending.

3 Thank you.

4 THE COURT: Good morning.

5 MR. KAZANJIAN: Good morning.

6 THE CLERK: And Mr. Haas.

7 MR. HAAS: Yes.

8 Good morning, Your Honor. Kevin M. Haas from the
9 law firm of Clyde Co US, LLP and I represent the defendant
10 Allied Assurance Company in this matter.

11 THE COURT: Good morning.

12 This matter is on for oral arguments. The
13 defendant has made a motion to dismiss.

14 So Mr. Haas, I'll give you the floor.

15 MR. HAAS: Thank you, Your Honor.

16 New York Botanical Garden filed this action
17 against Allied World Assurance Company for breach of
18 contract, declaratory judgment and breach of the implied
19 covenant of good faith. And on behalf of Allied World, we
20 filed the subject motion to dismiss the complaint with
21 prejudice.

22 This is a claim for contingent business
23 interruption where New York Botanical Garden seeks
24 insurance coverage for alleged business interruption loss
25 resulting from various government orders issued to stop the

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1 spread of the COVID virus.

2 Courts in New York have decided a string of
3 similar cases. In all of these cases, they have dismissed
4 the subject complaints with prejudice.

5 Allied World respectfully requests this Court to
6 follow this unbroken line of cases and dismiss this
7 complaint as well. Your Honor does not need to look
8 further than the complaint endorsement 15 to the Allied
9 World policy. And the New York case is cited in our
10 briefs. Together they compel dismissal of this action in
11 its entirety.

12 Endorsement 15 to the Allied World policy sets
13 forth the scope of the policy's contingent business
14 interruption coverage in clear and unambiguous terms.
15 Contingent business interruption means the necessary
16 suspension of your operations at a location owned by or
17 leased to you as a result of an order by a government body
18 or authority denying access to the location opened by or
19 leased to you, provided that such suspension is caused
20 solely and directly by a pollution incident on at or under
21 an independent location and such order is solely and
22 directly the result of a pollution incident at that
23 independent location.

24 So the requirements for coverage are very clear.
25 The government orders must deny access to the insured

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1 location at issue. The government orders must be issued
2 solely and directly as a result of a pollution incident at
3 a location not owned by New York Botanical Garden and the
4 suspension of New York Botanical Garden's operations must
5 have been caused solely and directly by a pollution
6 incident at that non-owned location.

7 New York Botanical Garden is not entitled to
8 contingent business interruption coverage under the policy
9 unless it can establish all three of these requirements.
10 In fact, none of them have been met and none could be.

11 First, none of the government orders in question
12 were issued solely and directly as a result of a pollution
13 incident at a non-owned location. They are all general in
14 nature and refer to no specific place.

15 Second, none of the government orders in question
16 denied New York Botanical Garden's access to the location
17 at issue. Access was limited, not denied.

18 In fact, as plaintiff points out in its brief, if
19 access had been denied the planets at The Garden would have
20 died.

21 Third, the suspension of New York Botanical
22 Garden's business was not caused solely and directly by a
23 pollution condition that a specific non-owned location
24 subject of any of the government orders. The affect on New
25 York Botanical Garden's business and the orders themselves

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1 pertain to the potential presence of COVID-19 everywhere,
2 not at any specific location. And the orders were not
3 solely and directly focused on the presence of COVID-19
4 anywhere specifically.

5 There are no cases that have addressed contingent
6 business interruption coverage for COVID-19 claim under a
7 pollution liability policy like this policy.

8 However, as I mentioned, there are multiple cases
9 in New York that have addressed contingent business
10 interruption coverage for COVID-19 claims in the context of
11 civil authority coverage and property policies.

12 Now, the civil authority contingent business
13 interruption coverage grant addressed in these cases is
14 very similar to the contingent business interruption
15 coverage in the Allied World policy. They both require
16 loss of income because access to the insured location was
17 prohibited or denied by a government order issued as a
18 direct result of a covered cause of loss at a non-owned
19 location.

20 New York Botanical Garden does not and cannot
21 claim that the relevant government orders were issued
22 solely as a result of COVID-19 at a specific location nor
23 does or can New York Botanical Garden claim that the impact
24 on its business was caused solely by the presence of
25 COVID-19 at that specific location.

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1 The relevant government orders were issued to
2 reduce the potential spread of COVID-19 with everywhere,
3 not in response to the presence of COVID-19 anywhere in
4 particular.

5 In 1012 Holdings versus Sentinel, Southern
6 District case reported at 507 F. 3d 482 coverage grant
7 language provided this insurance is extended to apply to
8 the actual loss of business income you sustain when access
9 to your scheduled premises is specifically prohibited by
10 order of a civil authority as a direct result of a covered
11 cause of loss to property in the immediate area of your
12 scheduled premises.

13 Addressing the very same government orders at
14 issue here, the Court held that the complaint did not
15 allege that closure of a neighboring property directly
16 resulted of closure of the insured property, rather the
17 insured and the neighbors were all forced to close for the
18 same reason, the general risk of harm from COVID-19.

19 The Court further concluded that coverage at issue
20 applied to a factually distinct situation when some
21 dangerous condition on neighboring premises forces a
22 shutdown of the insured premises.

23 The Allied World policy language is even more
24 restricted than that issue in that case in that the
25 government order must be issued solely and directly as a

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1 result of a pollution incident at a non-owned location and
2 the denial of access to that insured must be solely and
3 directly caused by that specific incident at that specific
4 non-owned location.

5 In Food For Thought versus Sentinel, Southern
6 District addressed another coverage contingent business
7 interruption with the same policy language and the same
8 government orders.

9 The Court held that the government orders did not
10 specifically prohibit access to the insured property. The
11 orders required work force reduction and closure of
12 non-essential business but did not deny access to the
13 property.

14 The Court explained that unlike a situation where
15 an unsafe condition in an adjoining property requires the
16 safe of evacuation of a covered property, here the owner
17 could continue to access its property.

18 The Court further concluded that the orders did
19 not prohibit access to the insured's property because of
20 COVID-19 at a specific neighboring property. Rather, both
21 locations were restricted for the same reason, to limit the
22 risk of spreading COVID-19.

23 In Sharde Harvey versus Sentinel, the Southern
24 District addressed another contingent business interruption
25 claim under the same policy language and addressed the same

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1 government orders.

2 The Court discussed the serious of cases issued by
3 New York Court COVID-19 contingent reasons interruption
4 claim under similar policy language. In the same
5 government orders the Court noted that all of the cases
6 that have addressed the same or similar policy language
7 found that the insureds are not entitled to coverage.

8 The Court noted that the order limited the address
9 but did not prohibit. The Court observed that New York
10 courts have consistently found that the same government
11 shutdown orders issued here did not prohibit access to the
12 premises.

13 The Court held that the insured could not
14 plausibly allege that any COVID issue of access was the
15 direct result of a covered cause of loss to property in the
16 immediate area because the orders did not name a specific
17 business. The complaint did not allege that closures of
18 neighboring property directly resulted in the closure of
19 the insured's property. Rather, the Plaintiff was forced
20 to close for the same reason as its neighbors, the risk of
21 harm to individuals on its own premises from the pandemic.

22 In Dressel versus Hartford, the Eastern District
23 addressed another COVID-19 contingent business interruption
24 claim under similar policy language. In the same
25 government order, policy applied where a civil authority

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1 restricted access as the direct result of a covered cause
2 of loss property in the immediate area.

3 The Court held that Governor Cuomo's orders were
4 simply not issued as a direct result of the presence of
5 COVID-19 at any specific property.

6 In Cetta versus Admiral, the Southern District
7 addressed another COVID-19 contingent business interruption
8 claim under similar policy language as seen on the orders.
9 The policy applied where there was damage to property other
10 than the insured's and an action by civil authority
11 prohibited access to both the insured's property and the
12 surrounding area due to the damage.

13 The Court determined that the very same civil
14 authority orders at issue here did not deny access to the
15 insured's property or neighboring property due to COVID-19
16 at any specific location.

17 In Office Solutions versus National Fire, Southern
18 District, another COVID-19 contingent business interruption
19 claim involving similar language and the same government
20 orders there.

21 The Court followed the prior clear and consistent
22 trend of other New York court cases declining to
23 reinterpret the executive orders.

24 Again, the Court noted that the orders were issued
25 in response to the rapid spread of the virus everywhere,

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1 not on the account of the presence of the virus on any
2 specific location. The orders neither prohibited access to
3 property nor they required closure of plaintiff's property
4 because of the specific presence of COVID-19 that a
5 neighbor's property.

6 In Visconti Bus Service, the Supreme Court in
7 Orange County addressed another COVID-19 contingent
8 business interruption coverage under similar policy
9 language. In the same government's orders the Court
10 discussed many of these cases and following them held that
11 the gist of civil authority coverage that harm to someone
12 else's property caused the civil authorities to prohibit
13 access to the insured's premises.

14 Here, both premises are restricted for the same
15 reason, to limit the risk of spreading COVID-19. This
16 simply does not implicate this coverage.

17 In 6593 Weighlock, the Supreme Court in Onondaga
18 County addressed another COVID-19 contingent business
19 interruption claim under similar policy language and the
20 same government orders, the Court similarly concluded that
21 the various government orders were not issued as a result
22 of COVID-19 at any specific location but instead to
23 mitigate and slow the spread of COVID-19 across the state.

24 And so in no less than eight cases every court in
25 New York that has considered complaints like this one has

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1 granted a motion to dismiss and held that there's no
2 coverage for a COVID-19 contingent business interruption
3 claim under similar policy language and the same government
4 orders.

5 We submit this Court should follow these cases and
6 dismiss the complaint with prejudice and without the right
7 to amend.

8 In the end, plaintiff claims that the government
9 orders to cause the loss in question, no amendment can fix
10 that and overcome this unbroken line of cases standing for
11 the same proposition that the subject government orders did
12 not deny access to plaintiff's property. They were not
13 issued solely because of the presence of COVID-19 at any
14 owned location and there is no basis to claim that the
15 presence of COVID-19 at a specific location subject of such
16 orders as the sole cause of any claim impact plaintiff's
17 business. The orders were simply issued to stop the spread
18 of COVID-19 everywhere.

19 Unless Your Honor has any questions, we would like
20 to rely on the arguments and cases cited in our briefs with
21 respect to the dismissal of the claim for breach of the
22 good faith and fair dealing.

23 I would just add that in light of all of the above
24 cases, this claim is clearly not viable.

25 Thank you, Your Honor.

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1 THE COURT: Thank you counsel.

2 I'm going to listen to the other side's argument,
3 the plaintiff's arguments.

4 I may have a couple of questions once we finish
5 the argument.

6 MR. HAAS: Yes, sir. Thank you.

7 THE COURT: All right Mr. Kazanjian, are you going
8 to argue or is Ms. Kyle?

9 MR. KAZANJIAN: I'm doing the argument, Your
10 Honor. Thank you.

11 First of all, I want to make sure that everyone
12 can hear me. I lost contact during Mr. Haas's argument and
13 called back in on another device. Hopefully you can hear
14 me.

15 THE COURT: A little low but we can hear you.

16 MR. KAZANJIAN: Thank you very much.

17 I don't know if I can get the audio up a little
18 bit harder. Hopefully you can hear me all right.

19 THE COURT: I can.

20 MR. KAZANJIAN: Thank you very much. And again,
21 good morning to everyone.

22 I am representing the New York Botanical Garden.
23 During the course of my remarks I may refer to the New York
24 Botanical Garden as NYBG or The Garden, obviously it's the
25 same entity. I may refer to Allied World as AWAC, A-W-A-C,

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1 which is an acronym. I just wanted to mention that for the
2 court reporter's purposes and to make clear who I'm
3 referring to.

4 The Court should deny the motion to dismiss that
5 has been brought by Allied World.

6 New York Botanical Garden's distinctive policy is
7 the touchstone for determining whether it has pleaded
8 coverage under the policy. This policy, Your Honor, is a
9 blanket pollution legal liability policy with business
10 interruption coverage. It's not a commercial property
11 insurance policy with civil authority coverage.

12 All of the cases that Mr. Haas discussed in his
13 argument, in his remarks, deal with commercial property
14 policies that have civil authority coverage and the key
15 issue in those policies is whether or not the policy holder
16 could demonstrate whether the presence of COVID-19 on
17 property constituted direct physical loss or damage caused,
18 that's what triggered the policy.

19 The policy here that was sold by Allied World to
20 my client, The Garden, doesn't contain that language. In
21 essence, what triggers the policy here is a pollution
22 incident. And a pollution incident is defined to include
23 viruses. In fact, in its papers, Allied World concedes
24 that COVID-19 constitutes a pollution incident under the
25 policy. So we're really dealing with apples and oranges.

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1 The policy language here that under the Allied
2 World blanket pollution legal liability policy also differs
3 meaningfully in other respects from those in the cases that
4 Allied World cites in support of its motion.

5 The Allied World policy that was purchased by The
6 Garden doesn't require that an order, a governmental order
7 specifically prohibits access to property. It doesn't
8 require that an independent location where there is a
9 pollution exclusion be proximate to The Garden's location.

10 In the cases that Mr. Haas described, the civil
11 authority provisions in those policies required proximity
12 that the neighboring property that was damaged be in some
13 approximate location, whether it was miles or immediately
14 nearby or neighboring property, that's not required under
15 the policy here. All it says is that there be a pollution
16 incident i.e., which includes viruses at an independent
17 location.

18 An independent location is defined very broadly
19 under the policy. An independent location is a location
20 that is not and was not at any time a location owned,
21 leased managed, operated or used by the insured New York
22 Botanical Garden. Very broad definition. There is no
23 proximity requirement. It doesn't have to be nearby, it
24 doesn't have to be a specific independent location. There
25 is no language in the policy saying that the pollution

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1 incident at an independent location needs to be a specific
2 independent location. You will not find that language in
3 the policy, Your Honor.

4 And all of that is important because the Court of
5 Appeals has made clear that in construing insurance
6 policies in insurance coverage disputes like this one, the
7 first principle is for the Court to look for the language
8 of the policy and that the policy language should be
9 enforced as written and that the policy should be construed
10 looking at the language of the policy as a whole, not
11 snippets here or there.

12 And we contend, Your Honor, that if you look at
13 the language of this policy as a whole that The Garden has
14 clearly pled facts sufficient to bring this action within
15 the scope of the coverage and clearly pleaded sufficiently
16 causes of action for breach of contract, for breach of the
17 implied covenant of good faith and fair dealing and for
18 declaratory judgment.

19 Mr. Haas indicated that the case law that he's
20 relying on requires that a government order impose total
21 denial of access to the policy holder's location. A
22 reading of the Allied World policy here that was sold to
23 The Garden makes clear that that is not the case.

24 The business interruption period is defined, state
25 that that period end for contingent business interruption

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1 when the insured can access the property on an other than
2 temporary basis. So it clearly contemplates that there
3 need not be a complete denial of access to trigger the
4 contingent business interruption coverage under the policy.

5 And we've described this in detail in our brief.
6 There are other provisions of the policy that support our
7 view that a total access denial is not required but the
8 business interruption period that is granted under this
9 policy extends to a full year and the limited coverage is
10 five million dollars.

11 There were much lower limits and durations for
12 business interruption where civil authority coverage in the
13 cases that Mr. Haas described in his argument. So there
14 are a number of distinguishing factors here in the Allied
15 World policy that make the cases that Allied World is
16 relying on in opposite, it's apples and oranges, Your
17 Honor. It's trying to fit a -- whatever metaphor you want
18 to use -- and Allied World made clear in -- and Mr. Haas
19 indicated in his remark this morning that Allied World
20 cannot cite a case involving this particular policy nor can
21 Allied World cite a case involving any specialty
22 environmental policy that would cover a pollution incident
23 that includes coverage for viruses like this policy does.

24 In view of that, we think that it's a stretch for
25 Allied World to be seeking dismissal and at this particular

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1 phase of the litigation, dismissal certainly is not
2 warranted.

3 Mr. Haas also talked a bit about the policy
4 language requiring that the necessary suspension of
5 operations from a government order be caused solely and
6 directly by a pollution incident at an independent
7 location. And again, that's all the policy language says,
8 at an independent location. It doesn't say a specific
9 independent location.

10 It's clear that there was no viruses being alleged
11 to be on site at New York Botanical Garden, so it's clear
12 that the orders that were an act of the executive order by
13 Governor Cuomo and Mayor de Blasio to deal with the
14 situation to stop the spread of COVID-19 were issued as a
15 result of presence of COVID-19 at independent locations.
16 That's all it says, independent locations, nothing more
17 specific than that.

18 Allied World is trying to conflate the language of
19 this policy, it's the worse specific language in cases
20 involving other policy under the commercial property
21 policies that have entirely different language than what
22 we're dealing with here.

23 I don't believe that there's any doubt that these
24 orders were issued as a result of COVID-19. COVID-19 is a
25 virus and a virus can constitute a pollution incident under

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1 the policy. We believe that even used a but for causation
2 standard, there is no other reason why these orders were
3 enacted other than but for COVID-19.

4 So we believe that that requirement has been met.
5 Certainly from a pleading standpoint.

6 Mr. Haas is describing the necessity to
7 demonstrate that these orders solely and directly the
8 result of a pollution incident at an independent location.
9 He's getting into a lot of potential fact issues. This is
10 a motion to dismiss pleading and based on the policy
11 language and based on the language of the orders
12 themselves, those orders cannot be said, conclusively
13 refute the allegations that have been made by New York
14 Botanical Garden in its complaint.

15 I am going to briefly address New York Botanical
16 Garden's claim for breach of the implied covenant of good
17 faith and fair dealing which is the third cause of action
18 in the Garden's complaint.

19 We cited in our brief, Your Honor, the Court of
20 Appeals decision in Bi-Economy, a 2008 decision from the
21 Court of appeals which clearly states that a claim for
22 consequential damages, which is what The Garden is looking
23 for here. What The Garden has pled can be based upon the
24 breach of the implied duty of good faith and fair dealing.
25 And in that case the only allegations in the Bi-Economy

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1 case. The only allegations that were reported in the case
2 were that the insurer wrongfully delayed payment and failed
3 to conduct a good faith investigation, timely good faith
4 investigation of the claim.

5 There is no requirement under the Bi-Economy case
6 that the policy holder needs to plead a higher standard of
7 conduct such as gross disregard for the policy holder's
8 rights under the policy.

9 Bi-Economy, the 2008 case from the New York Court
10 of Appeals marked the point of departure from the cases
11 that are cited by Allied World in its brief. A case from
12 1967, et cetera.

13 So we believe that we have sufficiently pled a
14 request for consequential damages based on Allied World's
15 breach of its implied duty of good faith and fair dealing
16 under the policy.

17 We would also refer the Court to the First
18 Department's ruling in the D.K. property case which was
19 cited in our brief which states that there is no heighten
20 leading requirement with respect to consequential damages.
21 And in the complaint New York Botanical Garden has gone
22 beyond that and has stated with particularity the kinds of
23 loss that it suffered as a result of Allied World's failure
24 to pay contingent business interruption coverage.

25 The Garden has stated and alleged and pleaded that

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1 it had to institute judgements, reduce problematic
2 activities, that it was unable to make new hires and
3 achieve its facility maintenance standards, it lost
4 opportunities to expands its plant collection and was
5 forced to deplete its endowment fund. And last but not
6 least, higher attorneys to litigate its coverage claim
7 here.

8 We believe, Your Honor, that under the case law
9 from the Court of Appeals and from the First Department
10 that this distinct -- given this distinct policy and the
11 language of this distinct policy that The Garden has more
12 than fulfilled its obligation from a pleading standpoint to
13 assert coverage under this distinct specialty pollution
14 liability policy which is different from the cases that are
15 cited by Allied World in its brief and that the orders that
16 Mr. Haas has attached to his affirmation do not
17 conclusively rule out the basis for coverage under the
18 policy here.

19 So we would respectfully request, Your Honor, that
20 the motion be denied or alternatively that The Garden be
21 granted leave to replead, if necessary, and I'm also
22 pleased to answer any questions that the Court may have.

23 Thank you for your time.

24 THE COURT: Okay, thank you.

25 I have a question for you. The business

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1 distinction that was made in the argument that I reviewed
2 in the papers is how the planet attempts to distinguish
3 their policy as a more blanket policy to deal with the
4 situation as compared to what you're relying on to the
5 specific language of the case that you're relying upon; how
6 would you address that?

7 MR. HAAS: Well, I think it's a distinction. It
8 is correct that the property policy provides coverage for
9 direct physical loss or damage whereas the pollution policy
10 provides coverage for a pollution incident, but that is
11 all. So all that means is that the business interruption
12 loss with respect to the property policies must flow from
13 physical loss or damage and the business interruption in
14 the pollution policy must flow from a pollution incident,
15 but otherwise the language is identical and not really
16 distinguishable in any material way.

17 So when you look at the definition of contingent
18 business interruption under the Allied World policy and
19 then look at the civil authority coverage that is discussed
20 in all of the cases that I discussed with Your Honor, it's
21 precisely the same, they both require business interruption
22 loss that results from a covered cause of loss, physical
23 loss or damage in the incident policy, a pollution incident
24 in the incident of the Allied World policy and it must be
25 because of a shutdown of insured premises of a covered

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1 location because of a covered cause of loss at a
2 neighboring or other non-owned location.

3 It's precisely the same thing. There is really no
4 difference and all of the distinctions that have been
5 pointed out are really distinctions with a no difference.
6 The Allied World policy uses the term denied access whereas
7 some of the others say prohibit. Denied and prohibit are
8 the same things. You can't have access. Access denied.
9 It doesn't mean partial or limited access is permitted. It
10 means access is denied and that is what is required.

11 These government orders didn't do that and all of
12 those cases so hold. The fact that the business
13 interruption period ends when the insured is allowed access
14 on an other than temporary basis doesn't mean anything.
15 The trigger of coverage remains that there must be a denial
16 of access to the insured property. All this is saying is
17 that the business interruption period will continue until
18 the insured is allowed to come back permanently, so that if
19 they are allowed to come back temporarily but they are
20 still not permitted to continue the operation that existed
21 before the order the business interruption period
22 continues. And nor does it matter that the costs that can
23 be recovered would be reduced if the insured is able at
24 some point to resume its operations. That doesn't affect
25 the trigger.

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1 So the trigger again is you need a civil authority
2 order that denies access. That does not exist here.

3 Then lastly, this point about that the policy will
4 terminate the business interruption period after three
5 hundred and sixty-five days if it should continue beyond
6 that, that has nothing to do with the issues before the
7 Court whatsoever. It doesn't change the fact that the
8 trigger is a civil authority order that denies access.

9 And Mr. Kazanjian made a couple of other points to
10 try to distinguish the two types of policies and one of the
11 points that he made was that he reads the policy language
12 to not require the location that is impacted by the
13 pollution incident to be proximate to the owned location.

14 THE COURT: That was actually my next question.

15 MR. HAAS: Yes, but -- and thank you, Your Honor,
16 but in fact, it needs to be proximate enough that whatever
17 pollution incident affects that covered location affects
18 that other location results in a government order
19 referencing that location that denies access to the insured
20 location. So what we're talking about -- and as some of
21 the cases talked about in the civil authority cases, we're
22 talking about a pollution incident happens at another
23 location that incident then affects the covered location in
24 such a way that a civil authority order has to be issued to
25 protect anyone who might be on, go on the covered location.

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1 So what happens is is that if you assume something
2 like a chemical release, for example, at a neighboring
3 location, if that chemical release then flows onto the
4 covered location, the government would then say, we're
5 going to have to deny access to your location for a period
6 of time, no one can go there until they all clear signal
7 and then you can go back to your location. That's not what
8 happened here. What happened here is the government wanted
9 to stop the spread of COVID. They told everybody to stop
10 their business, they didn't refer to any location alone,
11 one nearby, and they didn't refer to any covered location
12 nor they suggest that that covered location was being
13 denied access because of COVID-19 at some other place. It
14 was everywhere, it was everywhere, New York and all of New
15 York.

16 THE COURT: Okay.

17 MR. KAZANJIAN: Your Honor, may I respond briefly?
18 Unless Your Honor has any additional questions.

19 THE COURT: Well, I will ask you to respond to the
20 suggestion that since the executive order responded to
21 every place, not a specific location, as how you were
22 trying to suggest how should I consider what you're saying
23 about that.

24 MR. KAZANJIAN: Well, Your Honor, I think again we
25 just go back to the policy language. All of what Mr. Haas

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1 has just argued would make sense if that language were in
2 the policy but there is nothing in the policy stating that
3 there is a need for a specific location as an independent
4 location that it need to be nearby or proximate. That was
5 an interpretation that Mr. Haas and Allied World is reading
6 into the policy and we contend, Your Honor, that that is an
7 unreasonable interpretation based on the language of the
8 policy.

9 When you see the cases that Allied World sites in
10 its brief talking about specific locations, specifically
11 prohibit neighboring, immediate location, none of that
12 language is in our policy. Allied World knew how to write
13 a policy that had language like that. It's not in our
14 policy. So from a pleading standpoint, The Garden has more
15 than fulfilled its obligation to state a claim that's
16 sufficient to go forward with this case.

17 We would we rely on the cases from the Court of
18 Appeals, what the Court of Appeals has said that in Viking
19 Pump that the policy language is, the touchstone is the
20 guiding principle and you won't see anything about
21 specificity, proximity, immediacy anywhere in this policy
22 when you are looking at the phrase independent location.
23 All it says is that an independent location, this is what
24 the policy says, means a location that is not and was not
25 at any time a location owned, leased, managed, operated or

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1 used by The Garden, by the insured.

2 THE COURT: So that could be anywhere?

3 MR. KAZANJIAN: It could be anywhere. It could be
4 anywhere that's right, as long as it's in order.

5 What it does require is that the order be the
6 result, solely directly the result of a pollution incident
7 at an independent location. That's what we have here.
8 We've got but for causation, Your Honor. There was
9 COVID-19 at locations all around the state and we believe
10 that under the language of the policy, under the
11 interpreted principles articulated by the Court of Appeals,
12 The Garden has more than sufficiently pleaded coverage
13 under this policy and causes of action based on Allied
14 World obligations.

15 THE COURT: Okay, Mr. Haas, I'll give you the last
16 word since this is your motion.

17 MR. HAAS: Thank you, Your Honor.

18 Yes, well, I would just reiterate that the policy
19 language requires that the business suspension be caused
20 solely by a pollution incident at an independent location
21 and that the order is solely and directly the result of a
22 pollution incident at that location.

23 The government orders referred to no locations.
24 There is not a location. There is not a location. There
25 is no location and there is nothing in any of the orders

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1 that suggests that the New York Botanical Garden was shut
2 down, was denied access because of a pollution incident at
3 a separate specific, that location, incident location.

4 Thank you.

5 THE COURT: Okay, all, right thank you counselor.
6 I appreciate your argument.

7 I'm going to require the Plaintiff to order the
8 transcript -- defendant to order the transcript. His
9 notion.

10 I will upload it up to NYSID. I haven't seen the
11 motion for pro hac vice motion, I haven't seen that.

12 MR. KAZANJIAN: Yes, Your Honor, thank you very
13 much.

14 THE COURT: Is there any objection to that motion,
15 Mr. Haas?

16 MR. HAAS: No objection.

17 THE COURT: So I will do a short order granting
18 that decision, that order, all right.

19 MR. KAZANJIAN: Thank you, Your Honor, we
20 appreciate your time and the consideration that you gave us
21 today.

22 THE COURT: Okay, thank you.

23 MR. HAAS: Thank you.

24 THE COURT: All right, so motion submitted.

25 MR. KAZANJIAN: Thank you, Your Honor.

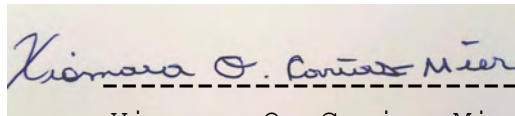
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MR. HAAS: Thank you everybody.

THE COURT: Take care.

* * * *

Certified to be a true and accurate transcript of the
stenographic minutes taken within.



Xiomara O. Carias-Mier
Senior Court Reporter